

DONALD W. FITZGERALD, State Bar No. 095348
JASON E. RIOS, State Bar No. 190086
FELDERSTEIN FITZGERALD
WILLOUGHBY & PASCUZZI LLP
400 Capitol Mall, Suite 1750
Sacramento, CA 95814
Telephone: (916) 329-7400
Facsimile: (916) 329-7435
e-mail: dfitzgerald@ffwplaw.com
e-mail: jrios@ffwplaw.com

Proposed Attorneys for Tollenaar Holsteins,
a California general partnership

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re:

TOLLENAAR HOLSTEINS, a
California general partnership,

Debtor.

CASE NO.: 15-20840-B-11

Chapter 11

DCN: FWP-2

Date:, February 6, 2015
Time: 3:00 p.m.
Judge: Hon. Christopher D. Jaime
Courtroom: 32, Department B

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
AUTHORITY TO USE CASH COLLATERAL AND FOR AUTHORITY TO PAY
PREPETITION WAGES, COMPENSATION AND UTILITIES**

Tollenaar Holsteins, a California general partnership (hereinafter “Debtor”), hereby submits this Memorandum of Points and Authorities in Support of the Motion for Order Authorizing Use of Cash Collateral and for Authority to Pay Prepetition Wages, Compensation and Utilities (the “Motion”). In support of the Motion, the Debtor respectfully represents as follows:

I.

STATEMENT OF FACTS

1. The basic facts pertinent to this Motion are contained in the Declaration Tami Tollenaar, attached as Exhibit A.
2. The primary Secured Creditors who may assert security interests in personal

1 property are Bank of the West and A.L. Gilbert Company, Associated Feed, Gavilon, LLC,
2 Foster Farms, Penny Newman and Mesa Verde (collectively, the "Feed Suppliers"). The Feed
3 Suppliers are owed money by the Debtor and may assert dairy liens. Bank of the West and the
4 Feed Suppliers are collectively referred to herein as the "Secured Creditors".

5 3. The Petition was filed on February 4, 2015. The Schedules and Statement of
6 Affairs have not been filed.

7 4. Attached to the Declaration of Tami Tollenaar is an Emergency Budget showing
8 expected revenues and emergency cash collateral needs. By this Motion authority is sought to
9 use cash collateral for period of February 4, 2015 through February 28, 2015 in the amounts
10 shown on the budget appended to the Declaration.

11 5. The Debtor's business is premised upon being able to milk and cull cows. If the
12 Debtor does not use cash collateral, much of which goes for feed, payroll and payroll related
13 items, it will be unable to pay its employees and they will cease work which will result in the
14 demise of the businesses. The primary collateral consists of the Debtor's livestock requiring daily
15 care.

16 6. The Debtor further requests authority to pay employee obligations, employee
17 deductions and employee expenses (the "Employee Compensation") and all utility expenses (the
18 "Utilities") as included in the Budget, including amounts owed for services or utilities delivered
19 pre-petition. The Debtor believes that such amounts would be entitled to priority claim status
20 under the provisions of section 507(a) or otherwise require adequate assurance under section 366
21 and that payment of the pre-petition Employee Compensation and Utilities is necessary to the
22 continued operation of the Debtor's business. If such payments are not made, there is a
23 substantial risk of loss of employees or utility service that would result in the Debtor's inability to
24 operate its business or care for its cows. Replacing the Debtor's employees would be difficult or
25 impossible and would require significant expense and loss of operations that the Debtor cannot
26 afford to incur.

27 7. Without use of cash collateral the Debtor will be unable to pay the insurance, fuel,
28 rent, utilities or pay its employees and will have to cease operations.

12 10. The Debtor requests that the Court authorize use of cash collateral for the Budget
13 Period, which funds constitute cash collateral of the Secured Creditors, purchase feed, materials,
14 pay employees, operate, and otherwise continue business operations as set forth on the budget.

18 12. By this Motion, the Debtor seeks to grant replacement liens to the extent cash
19 collateral is actually used. The Debtor is unaware of any other creditors having liens security
20 interest in the subject cash collateral, however, the Debtor seeks authority to use collateral of
21 any such creditor, if any, provided the creditor was served with notice of the Motion. The
22 Debtor alleges that the requested use of cash collateral is for and in the best interests of the
23 estate.

25 II.

14. As a Debtor, the Debtor's use of property of the Chapter 11 bankruptcy estate is governed by Section 363 of the Bankruptcy Code. Section 363(c)(1) provides in relevant part:

1 “If the business of the Debtor is authorized to be operated... Of this title and
 2 unless the court orders otherwise, the trustee may enter in transactions, including the
 3 sale or lease of property of the estate, in the ordinary course of business, without
 notice and a hearing, and may use property of the estate in the ordinary course of
 business without notice of hearing.”

4 15. Section 363(c)(2) establishes a special requirement, however, for the use of cash
 5 collateral. Cash collateral is defined as “cash, negotiable instruments, documents of title,
 6 securities, deposit accounts, or other cash equivalents whenever acquired in which the estate
 7 and an entity other than the estate have an interest...” 11 USC § 363(a). Section 363(c)(2)
 8 permits use of cash collateral under subsection (c)(1) only if one of two alternative
 9 circumstances exist:

10 (A) each entity that has an interest in such cash collateral consents; or

11 (B) the court after notice and a hearing, authorizes such use, sale, or lease in
 12 accordance with the provisions of this section.”

13 16. In accordance with BR 4001(d)(1), the Debtors have served the Motion on all
 14 lease or executory contract creditors; all secured creditors; all taxing agencies, the twenty
 15 largest unsecured creditors, or the Chapter 11 Trustee, if any; the Debtor and counsel; and
 16 the U.S. Trustee’s Office. Under the circumstances, it is submitted that the notice with respect
 17 to this emergency Motion is proper, and the Court should approve the requested use of cash
 18 collateral and set a further hearing on future uses of cash collateral.

19 17. As to the prepetition wages, courts routinely recognize the justifications set forth
 20 above for allowing a debtor to pay prepetition wages, compensation and benefits. The Debtor has
 21 the right to adopt reasonable employment policies pursuant to sections 1107 and 1108 of the
 22 Bankruptcy Code and may use property of the estate to continue its operations under section
 23 363(b). Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a
 24 hearing, may use, sell or lease, other than in the ordinary course of business, property of the
 25 estate...” 11 U.S.C. §363(b)(1). Section 363(c)(1) allows the Debtor to use property of the estate
 26 in the ordinary course of business without court approval. Furthermore, courts recognize that a
 27 debtor-in-possession has a fiduciary duty to, among other things, protect and preserve the
 28 bankruptcy estate, including preserving an operating business’ going concern value. *In re CoServ*,

1 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002).

2 18. In addition, section 507(a) of the Bankruptcy Code provides a list of priorities in
3 distribution of the estate of the debtor. The fourth and fifth priorities are for the wages and
4 benefits of employees of the debtor, respectively, up to \$12,475, for unpaid wages and benefits
5 earned within 180 days before the Petition Date; the eighth priority relates to employment taxes.
6 These priority claimants are paid in full before the general unsecured creditors of the estate
7 receive a dividend.

8 19. Furthermore, authorizing payment of such prepetition employment expenses is an
9 appropriate exercise of the court's discretion under sections 363(b) and 105(a) and Federal Rule
10 of Bankruptcy Procedure Rule 6003 and Bankruptcy Code Section 366 applies to utilities. See
11 e.g. *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-76 (Bankr. S.D.N.Y. 1989); see also
12 *Northwest Engineering Co. v. United States Steel Workers*, 863 F.2d 1313, 1315 (7th Cir. 1988)
13 ("If employees were treated in all respects as unsecured creditors, they would be inclined to desert
14 a leaky ship, speeding up the firm's collapse. . ."). The Ninth Circuit has recognized the
15 "necessity of payment" doctrine. *In Burchinol v. Central Washington Bank (In re Adam's Apple,*
16 *Inc.)*, 829 F.2d 1484, 1490 (9th Cir, 1987).

17 III.

18 CONCLUSION

19 Based upon the foregoing, the Debtor respectfully requests that this Court enter an
20 order (i) approving the interim use of cash collateral at the hearing; (ii) authorizing the use of
21 cash collateral on terms prescribed by the Court; (iii) setting a hearing on further uses of cash
22 collateral; (iv) authorizing payment of amounts owed for Employee Compensation or Utilities,

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 including amounts owed for services or utilities delivered pre-petition, and (v) granting such
2 other and further relief as the Court deems just and proper under the circumstances.

3 Dated: February 6, 2015

4 FELDERSTEIN FITZGERALD
WILLOUGHBY & PASCUZZI LLP

5
6 By: /s/ Jason E. Rios
JASON E. RIOS
7 Proposed Attorneys for Tollenaar Holsteins,
a California general partnership
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28